INDEX

	Page
Opinion below	1
Jurisdiction	1
Statutes and rules involved	2
Questions presented	2
Statement	3
Specification of errors to be urged	7
Reasons for granting the writ	7
Appendix	19

CITATIONS

Cases:	
Averill v. *Smith*, 17 Wall. 82	15
Bierce v. *Hutchins*, 205 U. S. 340	9
Franklin Brewing Co., In re, 249 Fed. 333	15
General Import & Export Co. v. *United States*, 286 U. S. 70	9
General Motors Acceptance Corp. v. *United States*, 286 U. S. 49	9
Heyman v. *United States*, 285 Fed. 685	14
Lottawanna, The, 20 Wall. 201	14
Siren, The, 7 Wall. 152	14
Southern Pac. Company v. *Bogert*, 250 U. S. 483	9
Thompson v. *United States*, 142 U. S. 471	13
United States v. *Commercial Credit Corp.*, 286 U. S. 63	9
United States v. *Frank Rizzo, Etc.*, No. 621, Oct. Term 1934	5
United States v. *Rindskopf*, 105 U. S. 418	15
Union Trust Co. v. *Great Eastern Lumber Co.*, 248 Fed. 46	14
United States v. *One Ford Coupe*, 272 U. S. 321	13
United States v. *Ulrici*, 111 U. S. 38	13
United States v. *The Ruth Mildred*, 286 U. S. 67	9
Zimmerman v. *Harding*, 227 U. S. 489	9
Revised Statutes:	
Sec. 3248 (U. S. C., Title 26, Sec. 242)	13, 20
Sec. 3251 (U. S. C., Title 26, Sec. 249)	13, 21
Sec. 3334 (U. S. C., Title 26, Sec. 262)	13
Statutes:	
Act of August 27, 1894, c. 349, 28 Stat. 563, Sec. 48 (U. S. C., Title 26, Sec. 246	13
Act of Feb. 26, 1926, c. 27, Sec. 900, 44 Stat. 9, 104 (U. S. C., Title 26, Sec. 245)	19
Act of January 11, 1934, c. 1, Sec. 2, 48 Stat. 313	20
Miscellaneous:	
Admiralty Rules:	
Rule 11	21
Rule 42	22

In the Supreme Court of the United States

OCTOBER TERM, 1935

No. ——

UNITED STATES OF AMERICA, PETITIONER

v.

FRANK RIZZO, CLAIMANT OF 146,157 GALLONS OF Alcohol

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

The Solicitor General, on behalf of the United States of America, prays that a writ of certiorari issue to review the order of the Circuit Court of Appeals for the Third Circuit entered in the above cause on June 4, 1935.

OPINION BELOW

No opinion was rendered by the Circuit Court of Appeals, the reasons for its order being stated therein (R. 546).

JURISDICTION

The order of the Circuit Court of Appeals was entered June 4, 1935. (R. 546.) The juris-

diction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

STATUTES AND RULES INVOLVED

The statutes and rules involved will be found in the Appendix, *infra*, pp. 19–22.

QUESTIONS PRESENTED

Pending final determination of the claimant's appeal in a forfeiture proceeding in admiralty against a cargo of alcohol, the claimant petitioned the Circuit Court of Appeals to order a sale of the same, because of the necessity of removing the alcohol from the vessel in which it was contained. The court ordered the sale, which was made free of internal revenue taxes, and confirmed the sale on those terms. The proceeds of the sale were deposited in the registry of the court.

The questions presented are:

1. Has the Government lost its right to assert against the proceeds of sale a claim for internal revenue taxes due on the alcohol before the sale, by not asserting such claim in its libel for forfeiture?

2. Has the Government lost its right to assert against the proceeds of sale a claim for internal revenue taxes due on the alcohol, by awaiting the outcome of the forfeiture proceeding before asserting the claim for tax?

3. Did the Government lien, which attached to the alcohol before sale, thereafter attach to the proceeds of sale?

STATEMENT

On December 12, 1932, the oil barge DORIS and her cargo of 146,157 gallons of grain alcohol were seized by Customs and Coast Guard officials acting jointly as she was lying in dock at Port Johnson, Bayonne, New Jersey. (R. 4–24.) On December 22, 1932, and December 30, 1932, respectively, a libel and an amendment thereto were filed in the United States District Court for the District of New Jersey against the vessel and its cargo of alcohol. The ground for forfeiture set up in the libel was violation of Section 584, paragraph 814, Section 594 of the Tariff Act of 1930, and Section 4377 of the Revised Statutes. (R. 4, 22.) The District Court declared the alcohol forfeited for violation of Section 4377 of the Revised Statutes and ordered it sold by the United States Marshal, and that the proceeds be deposited in the registry of the court. (R. 46–47.) The claimant appealed from the order of the District Court, and on October 2, 1934, the Circuit Court of Appeals for the Third Circuit reversed the decree of forfeiture and ordered the alcohol, or its proceeds in the event it had been sold, returned to the claimant. (R. 513.) The final decree was entered the same day. (R. 514.) At that time the alcohol had not been sold, but was in the custody of the United States Marshal for the District of New Jersey. (R. 526.) The Government filed a petition for rehearing, which was denied December 5, 1934. (R. 525.)

On November 19, 1934, while the petition for rehearing was pending, the claimant filed a petition asking the court to order a sale of the alcohol on the ground that the barge DORIS, in which the alcohol was then contained, had been sold and immediate delivery of the barge was imperative. The petition further asked that the proceeds of sale be paid into the registry of the court. (R. 515–517.) On November 22, 1934, the Circuit Court of Appeals ordered the alcohol sold, and further ordered that the proceeds of sale should be deposited in the registry of that court, and "be substituted in the place and stead of said 146,157 gallons of alcohol", and that all further procedings should be against said proceeds of sale. (R. 521–523.) On December 4, 1934, that court by its order fixed the terms of sale which included terms that the sale was pursuant to its order of November 22, 1934, and that the cargo of alcohol was offered for sale free and clear of all claims of any kind or character, but subject to the court's approval and confirmation. (R. 523–525.) On December 8, 1934, the United States Marshal for the District of New Jersey offered the said alcohol at public auction, and the highest bid therefor was $1.85 per wine gallon. (R. 526.) On December 11, 1934, the court below entered its order confirming the sale, and directed the United States Marshal to deliver the alcohol to the purchaser free of all government taxes or tax liens and custom duties. (R. 527–528.) The Government duly excepted to the making and

entry of the order. (R. 528.) A petition for a writ of certiorari, wherein was questioned the authority of the Circuit Court of Appeals to include such provisions in its order of confirmation, was denied by this Court on January 21, 1935. *United States* v. *Frank Rizzo, Claimant of 146,157 Gallons of Alcohol,* October Term, 1934, No. 621. Afterward, the United States Marshal consummated the sale, and deposited in the registry of the Circuit Court of Appeals approximately $265,000.

On January 24, 1935, there were filed in the clerk's office of the Circuit Court of Appeals certain alleged assignments of about $221,000 of said proceeds from the claimant Rizzo to his attorneys and another person. (R. 529–531.) On February 2, 1935, the United States filed a petition with said Circuit Court of Appeals, setting forth that internal revenue taxes in the sum of $552,226.80 were due on the alcohol, and asking said court to direct that the proceeds of sale then in its registry, or to come into its registry, be appropriated toward the payment of the tax due on said alcohol. Attached to and supporting this petition was the affidavit of the Collector of Internal Revenue for the Fifth Collection District of New Jersey, certifying that prior to the seizure of said alcohol and continuing thereafter, no tax on the same had been paid. (R. 532–536.) On April 22, 1935, a notice of levy for the full amount of the tax was addressed to and filed with the clerk of said Circuit Court of Appeals by the Collector of Internal Revenue for the First

Collection District of New Jersey, together with warrant for distraint, two notices of tax liens under internal revenue laws, and a copy of notice and demand for tax. (R. 537–541.) On the same date, similar notices and demands were addressed to and filed with the clerk of said Circuit Court of Appeals by the Collector of Internal Revenue for the First Collection District of Pennsylvania. (R. 542–545.) On April 25, 1935, there was filed with the clerk of said court another assignment by the claimant to one Charles Fisher of the sum of $31,000 of the proceeds then on deposit in the court's registry. (R. 545–546.)

On June 4, 1935, the court below entered the order now complained of, declaring in effect that since the Government had failed to raise the question of taxes when it filed its libel, but waited until the libel suit had gone to final decree and until after this Court had denied the application for writ of certiorari, it was then too late to do so; and the court ordered that the proceeds of sale be paid over by the clerk to the claimant or his assigns. (R. 546–547.)

On June 6, 1935, a petition by the United States, addressed to the Circuit Court of Appeals for the Third Circuit, was filed, setting forth its intention to apply to this Court for a writ of certiorari; whereupon said court ordered all further proceedings stayed pending the outcome of the petition for a writ of certiorari. (R. 547–548.)

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In holding in effect that the United States had waived its right to assert a claim for taxes on the alcohol by not asserting it in the original libel for forfeiture.

2. In holding in effect that the United States was chargeable with laches in not raising the question of taxes in the forfeiture proceedings.

3. In failing to order the payment of taxes due on the alcohol out of the proceeds of sale when it had been formally notified of the existence of the tax claim.

4. In ordering that the entire proceeds of sale of the alcohol be paid over to the claimant or his assigns in disregard of the Government's claim for taxes.

5. In denying the Government's petition for payment of the tax out of the proceeds of sale in the registry of the court.

REASONS FOR GRANTING THE WRIT

1. The decision below, holding in effect that the Government waived, or by laches lost, its right to assert a claim for taxes due on the alcohol, by failing to assert it in the original libel or earlier in the proceedings, is untenable, and in conflict with the weight of authority.

(a) By seeking forfeiture of the alcohol, the Government did not thereby waive its right thereafter to seek collection of any taxes that might be

due thereon. The libel for forfeiture was based upon alleged violations of the customs and navigation laws. The right to forfeiture for violations of customs and navigation laws exists wholly independent of the Government's right to tax the subject-matter. The result of the forfeiture proceedings could only be the determination of the right of ownership of the alcohol as between the Government and the claimant. The District Court had decreed forfeiture. But if in the forfeiture proceedings it should be finally determined that claimant was the owner of the alcohol, then the liability of claimant for payment of tax on the alcohol would thereupon arise. With the alcohol in his possession, the claimant himself would have been compelled to pay the taxes imposed by Section 900 of the Revenue Act of 1926, as amended by Section 2 of the Liquor Taxing Act of January 11, 1934, *infra*, p. 19, 20.

No estoppel or waiver by election exists. The remedy by forfeiture and the right to tax are separate and distinct. They do not depend upon the same facts. Because of the alleged violation of the customs and navigation laws, the right to seek forfeiture of the alcohol arose; in addition, and because of the revenue laws, the alcohol became subject to a tax. It cannot be said, as was urged below, that the United States, by proceeding against the alcohol for forfeiture, had elected to pursue one of two inconsistent rights or remedies, thereby waiving its right to the tax.

This Court has previously considered the question of waiver or estoppel by election. In *Bierce* v. *Hutchins,* 205 U. S. 340, at page 346, this clear statement of principles is found, "Election is simply what its name imports; a choice, shown by an overt act, between two inconsistent rights, either of which may be asserted at the will of the chooser alone." See also *Zimmerman* v. *Harding,* 227 U. S. 489; *Southern Pacific Company* v. *Bogert,* 250 U. S. 483.

The decisions of this Court in *General Motors Acceptance Corporation* v. *United States,* 286 U. S. 49, *United States* v. *The Ruth Mildred,* 286 U. S. 67, *United States* v. *Commercial Credit Corporation,* 286 U. S. 63, and *General Import & Export Company* v. *United States,* 286 U. S. 70, are not applicable to the present situation. In those cases, this Court considered and settled only the question of election of forfeiture remedies as between (a) the customs and navigation laws, and (b) the National Prohibition Act, Title 26.

This case does not present a situation in which the Government had elected to rely on one of two inconsistent causes of forfeiture, and is now attempting to invoke the other. We are no longer concerned with the forfeiture proceeding as such. Even if it could be said that the Government had made an election of remedies in that proceeding, that fact would have no significance at this time in connection with the present assertion of a claim for taxes, a wholly separate and distinct claim.

(b) The Government was not guilty of laches in failing to raise the question of taxes earlier.

The District Court held herein that the claimant Rizzo was not the owner of the alcohol and ordered that it should be forfeited, and further (R. 53)—

> ORDERED, ADJUDGED and DECREED, that the proceeds of sale of said 146,157 gallons of alcohol, be deposited in the registry of this court to be forfeited to the United States of America, in the event that the decree heretofore entered herein, and as amended, becomes final by lapse of time within which appeal may be taken, or be affirmed upon appeal in the event an appeal is taken, and that in the event the decree herein as amended shall be reversed on appeal and final judgment entered for the claimant of said 146,157 gallons of alcohol, then the said proceeds of sale so deposited as aforesaid, in the registry of this court, shall become the property of and be delivered to the said claimant; and it is further
>
> ORDERED, ADJUDGED and DECREED, that said proceeds of sale so deposited in the registry of this court, shall be substituted in the place and stead of said 146,157 gallons of alcohol, and that all further proceedings herein shall be against said proceeds of sale.

Under those circumstances there was then no occasion or necessity for the assertion by the Government of its tax claim. The Circuit Court of Appeals reversed the District Court's decree of

forfeiture. The alcohol not having been sold, claimant Rizzo petitioned the Circuit Court of Appeals, seeking the sale of the alcohol as perishable, and asked that the sale be made in accordance with the District Court's order of sale. The Circuit Court of Appeals decreed the sale and ordered that the proceeds be deposited in the registry of that court, and—

> Further, ORDERED, ADJUDGED and DECREED, that said proceeds of sale so deposited in the registry of this court, shall be substituted in the place and stead of said 146,157 gallons of alcohol, and that all further proceedings herein shall be against said proceeds of sale.

It is clear that up to this point all parties, as well as the District Court and the Circuit Court of Appeals, were proceeding on the theory that any interest in or claims against the alcohol would be realized from the proceeds of sale thereof. Accordingly, the Government was wholly justified in interpreting and relying upon the court's orders as protection of the Government's claim for taxes.

The agreement to the terms of sale, referred to in the court's order of December 4, 1934, did not indicate or imply any relinquishment by the Government or the claimant of their respective rights, or claims to the proceeds of sale.

When the court on December 11, 1934, confirmed the sale and issued directions to the United States Marshal to deliver the alcohol to the purchaser free

of government taxes and tax liens, it did not thereby decide that there were no taxes due on the alcohol. The only effect of the order of confirmation of the sale was that the court determined that the price bid was the best price obtainable for the same; and when the court directed that the alcohol be delivered to the purchaser free and clear of all government taxes and tax liens, it clearly indicated the fact that no taxes had been paid, and by directing the proceeds of sale to be deposited in its registry created a fund out of which the taxes, so far as possible, should be paid.

The sale was completed and the proceeds were paid into the registry of the court on January 21, 1935. The Government filed its petition in the Circuit Court of Appeals on February 2, 1935, asserting its tax lien. The petition was in full conformity with and provided for by Rule 42 of the Admiralty Rules, *infra,* p. 22. Clearly the proper procedure was followed.

2. By ordering the delivery of the alcohol to the purchaser free of government taxes, the court below recognized that the taxes had not been paid, and by requiring the proceeds to be deposited in its registry the court must be presumed to have intended to protect the Government in the collection of its taxes. Any other construction or effect that may be given to its orders or conduct in the premises would indicate an intent to dispose of the alcohol in direct violation of the internal-revenue laws.

By the Revenue Act of February 26, 1926, c. 27, Sec. 900, 44 Stat. 9, as amended by the Act of January 11, 1934, c. 1, Sec. 2, 48 Stat. 313, a basic tax is imposed on all distilled spirits produced in or imported into the United States. By Section 3248 of the Revised Statutes (U. S. C., Title 26, Sec. 242), the tax attaches as soon as the spirits come into existence as such.

Under the circumstances herein, and after Rizzo was held to be a lawful owner of the alcohol, the orderly procedure for the collection of the tax due on the alcohol would, under Sections 246 and 262 of Title 26, U. S. C. (R. S. 3334, Act of March 1, 1879, c. 125, 20 Stat. 340, and Sec. 48 of the Act of August 27, 1894, c. 349, 28 Stat. 563), have been to require the payment of the tax and the affixing of tax-paid stamps to the containers of the alcohol, when it was sold by order of the court. This, however, was not done. It therefore became necessary for the Government to assert its lien against the proceeds of sale.

That the United States has a lien on distilled spirits for the amount of the taxes due thereon, until paid, has been held by this Court. *Thompson* v. *United States,* 142 U. S. 471; *United States* v. *One Ford Coupe,* 272 U. S. 321; *United States* v. *Ulrici,* 111 U. S. 38.

By Section 3251 of the Revised Statutes (U. S. C., Title 26, Sec. 249) the tax is declared to be a first lien on the spirits until the tax is paid.

Upon the sale of the alcohol and the deposit of the proceeds of sale in the registry of the court, the lien for taxes was transferred to said proceeds of sale. *The Lottawanna,* 20 Wall. 201; *The Siren,* 7 Wall. 152.

In *Union Trust Co.* v. *Great Eastern Lumber Co.,* 248 Fed. 46, 50 (C. C. A. 5th), it was held to be—

> the recognized duty of the court, which had displaced the usual remedies for the collection of taxes by the receivership, to provide for the payment of taxes out of the proceeds of the sale, and not to remit the tax authorities to a belated use of their remedies against the property after it had passed out of the court's possession into that of the purchaser * * *.

In *Heyman* v. *United States,* 285 Fed. 685 (C. C. A. 6th), the bankrupt's trustees had sold distilled spirits without requiring the floor tax to be paid by the purchasers at the time of sale, although retaining the equivalent of this additional tax as a fund in bankruptcy. The court held (p. 688):

> In good conscience the court could not make the purchasers pay the tax again, nor can it permit the trustees to retain the fund accumulated under an erroneous order of sale contrary to the rights of the government, which was then no party to the proceedings. Further, in conscience, the government is entitled to this fund. It does, in effect, represent the tax. It is, as held by the court below, a trust fund.

In *Averill* v. *Smith,* 17 Wall. 82, 95, the Court said:

> Perishable property may be sold and the proceeds paid into the registry of the court, in which event the proceeds represent the property seized * * *.

It is uniformly held that a court of bankruptcy has power to order property sold free from liens, provided the liens are preserved against the proceeds. In *In re Franklin Brewing Co.,* 249 Fed. 333, 335 (C. C. A. 2d) the court stated:

> We have recognized the power of the court sitting in bankruptcy to sell free and clear of liens, and transfer the same to the proceeds of sale (Re Kohl-Hepp Brick Co., 176 Fed. 340, 100 C. C. A. 260; Re Haywood Wagon Co., 219 Fed. 655, 135 C. C. A. 391), agreeing with earlier considerations of the same question in the First Circuit (Re Union Trust Co., 122 Fed. 937, 59 C. C. A. 461; Re Shoe & Leather Reporter, 129 Fed. 588, 64 C. C. A. 156).

Pursuant to Section 3182, Revised Statutes (U. S. C., Title 26, Sec. 102), the Commissioner of Internal Revenue made an assessment against Rizzo and all other claimants to the alcohol, "or the proceeds of the sale thereof" in the registry of the court. By this assessment there was determined the amount of tax due, and that it had not been paid. The assessment is *prima facie* evidence that the tax is due. *United States* v. *Rindskopf,* 105 U. S. 418.

Pursuant to Section 3186, Revised Statutes, as amended by Section 613 of the Revenue Act of 1928 (c. 852, 45 Stat. 791, 875), the Collector of Internal Revenue for the First District of Pennsylvania filed with the clerk of the U. S. Circuit Court of Appeals for the Third Circuit a notice of tax lien under the internal-revenue laws.

In the assertion of its lien, and pursuant to Rule 42 of the Admiralty Rules, the Government filed its petition in the Circuit Court of Appeals.

The United States has duly and promptly complied with the statutory provisions for the assertion of its tax lien.

Under these circumstances, it was the clear duty of the Circuit Court of Appeals to order that the proceeds of sale held in its registry should be paid to the United States in satisfaction *pro tanto* of the tax due on the alcohol.

The ruling of the court below denying the Government's lien on the proceeds of sale in effect constitutes an erroneous interpretation and application of a Federal statute giving to the Government a first lien on distilled spirits for the payment of Federal taxes due thereon, until paid. The legal effect of the statute, as applied to a situation such as herein presented, we believe, has not been, but should be, passed upon by this Court.

3. The question herein presented is before this Court for the first time in these proceedings. The prior petition did not in any way raise the question now presented, as to the right of the Government

to assert against the proceeds its lien for taxes. The prior petition for writ of certiorari presented the question whether the lower court had authority to order the sale of the alcohol free and clear of all revenue taxes, when such taxes had not been paid, and, in confirming the sale, to order that the alcohol be treated by the Government as tax paid. The denial of that petition is not to be applied or interpreted as deciding that no taxes were due, or that the Government might not thereafter enforce its tax lien against the proceeds of sale, as it now seeks to do. The only fair and reasonable inference to be drawn from the order of the Circuit Court of Appeals confirming the sale free and clear of claims for taxes, and this Court's denial of the petition for certiorari, would seem to be that it was intended thereby to substitute the proceeds of sale in place of the alcohol itself and that any claims or interest in the alcohol should thereafter attach to the proceeds, thus preserving the rights of all parties.

By the prior petition for certiorari the Government sought to maintain its rights against the *res* which was then in the custody of the court. By the present petition the Government is seeking to maintain its rights against the proceeds of sale of the *res*. By denial of the prior petition it was finally determined in effect that the Government could not prevent the confirmation of sale of the alcohol on the terms indicated. But, we submit, it does not follow that the Government thereby lost

its lien and right against the proceeds of the sale. That right has been duly and promptly asserted. But the Circuit Court of Appeals has held that the right has been lost because the Government did not include its tax claim in the original libel and forfeiture proceeding. We submit that holding cannot stand.

CONCLUSION

The decision of the court below in effect deprives the United States of its right to assert its claim for taxes. The Government has not in any way waived or for any reason lost its lien for the payment of taxes. Upon the sale of the alcohol the lien attached to the proceeds of sale. The Government has duly and promptly asserted its lien against the proceeds. The denial by the lower court of the Government's lien constitutes an erroneous interpretation of the Federal statute, and further constitutes a clear departure from the accepted and usual course of judicial procedure, and thus calls for the exercise of this Court's power of supervision.

Wherefore, it is respectfully submitted that this petition should be granted.

STANLEY REED,
Solicitor General.

JULY 1935

APPENDIX

The Revenue Act of February 26, 1926, c. 27, Section 900, 44 Stat. 9, 104 (Title 26, U. S. C., Sec. 245) provides:

Subdivision (a) of section 600 of the Revenue Act of 1918, as amended, is amended to read as follows:

"SEC. 600. There shall be levied and collected on all distilled spirits now in bond or that have been or that may be hereafter produced in or imported into the United States, in lieu of the internal-revenue taxes now imposed thereon by law, an internal-revenue tax at the following rates, to be paid by the distiller or importer when withdrawn, and collected under the provisions of existing law:

* * * * *

"(3) On and after January 1, 1928, $1.10 on each proof gallon or wine gallon when below proof and a proportionate tax at a like rate on all fractional parts of such proof or wine gallon.

"(4) On and after the enactment of the Revenue Act of 1926, on all distilled spirits which are diverted to beverage purposes or for use in the manufacture or production of any article used or intended for use as a beverage there shall be levied and collected a tax of $6.40 on each proof gallon or wine gallon when below proof, and a proportionate tax at a like rate on all fractional parts of such proof or wine gallon, to be paid by the person responsible for such diversion. If a tax at the rate of $2.20,

> $1.65, or $1.10 per proof or wine gallon has been paid upon such distilled spirits a credit of the tax so paid shall be allowed in computing the tax imposed by this paragraph.

The Act of January 11, 1934, c. 1, Section 2, 48 Stat. 313, amending the Revenue Act of 1926, provides in paragraphs 3 and 4 as follows:

> (3) On or after January 1, 1928, and until the effective date of Title I of the Liquor Taxing Act of 1934, $1.10 on each proof gallon or wine gallon when below proof and a proportionate tax at a like rate on all fractional parts of such proof or wine gallon; and
>
> (4) On and after the effective date of Title I of the Liquor Taxing Act of 1934, $2.00 on each proof gallon or wine gallon when below proof and a proportionate tax at a like rate on all fractional parts of such proof or wine gallon.

The Act of July 20, 1868, c. 186, Sec. 4, 15 Stat. 126 (Revised Statutes, Sec. 3248, U. S. C., Title 26, Sec. 242) provides:

> Distilled spirits, spirits, alcohol, and alcoholic spirit, within the true intent and meaning of this chapter, is that substance known as ethyl alcohol, hydrated oxide of ethyl, or spirit of wine, which is commonly produced by the fermentation of grain, starch, molasses, or sugar, including all dilutions and mixtures of this substance; and the tax shall attach to this substance as soon as it is in existence as such, whether it be subsequently separated as pure or impure spirit, or be immediately, or at any subsequent time, transferred into any other substance, either in the process of original production or by any subsequent process.

The Act of June 6, 1872, c. 315, Sec. 12, 17 Stat. 238 (Revised Statutes, Sec. 3251, U. S. C., Title 26, Sec. 249) provides:

> Every proprietor or possessor of, and every person in any manner interested in the use of, any still, distillery, or distilling apparatus, shall be jointly and severally liable for the taxes imposed by law on the distilled spirits produced therefrom, and the tax shall be a first lien on the spirits distilled, the distillery used for distilling the same, the stills, vessels, fixtures, and tools therein, the lot or tract of land whereon the said distillery is situated, and on any building thereon from the time said spirits are in existence as such until the said tax is paid.

Admiralty Rule No. 11 provides:

> In all cases where any goods or other things are arrested, if the expense of keeping the same is excessive or disproportionate, or if the same are perishable, or are liable to deterioration, decay, or injury, by being detained in custody pending the suit, the court may, on the application of either party, order the same or any portion thereof to be sold; and the proceeds, or so much thereof as shall be full security to satisfy any decree, to be brought into court to abide the event of the suit; or the court may, on the application of the claimant, order a delivery thereof to him, either on the filing of a written agreement of the parties or their proctors of record to that effect, or on a due appraisement, to be had under its direction, unless the value has been agreed to in writing by the parties or their proctors of record, on the claimant's depositing in court so much money as the court shall order, or on his giving a stipulation, with sufficient

sureties or an approved corporate surety, in such sum as the court shall direct or as shall be agreed upon in writing by the parties or their proctors of record, conditioned to abide by and pay the money awarded by the final decree rendered by the court, or any appellate court, if any appeal intervenes, not to exceed however in any event such agreed or appraised value with interest at six per cent. per annum and costs, as the one or the other course shall be ordered by the court.

Admiralty Rule No. 42 provides:

> Any person having an interest in any proceeds in the registry of the court shall have a right, by petition and summary proceedings, to intervene *pro interesse suo* for delivery thereof to him, and on due notice to the adverse parties, if any, the court shall and may proceed summarily to hear and decide thereon, and to decree therein according to law and justice. And if such petition or claim shall be deserted, or on a hearing, be dismissed, the court may, in its discretion, award costs against the petitioner in favor of the adverse party.

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